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POLITICAL JUSTICE - OUTLINE OF A PHILOSOPHICAL THEORY *

by

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Ever since Antigone, in response to the call of the "unwritten divine commandments", disregarded King Kreon's prohibition and buried her brother, thereby risking her own life, the development of Law and State in the Western world has been dependent on a normative-critical impulse. Against the arrogance of government, which believes that it is allowed to raise arbitrary rules to the rank of valid laws, the idea of pre- and supra-positive principles of Law and State is defended and every political association is obliged to recognize these principles. The totality of these principles was known for hundreds of years as Natural Law; in Ancient and Medieval times people also spoke of Divine Law and, in the Enlightenment, of the Law of Reason. Today these concepts are considered to be compromised and one prefers to speak of Political Justice. But in the eyes of many people this concept, too, has lost its status as Law. This is true, for example, of Luhmann and of liberal democratic theorists, according to whom political legitimation occurs through (democratic) procedure alone.

The following attempt to establish supra-positive principles of Law and State sketches (in the first part), the requirements of an appropriate theory of Justice and, in the second part, a constructive outline which fulfils these requirements.

I. Requirements of an appropriate Theory of Political Justice

An appropriate theory of Justice must, firstly, when considered systematically, take seriously those objections which in the course of time have been raised against the establishment of supra-positive principles of Law and State, for example, in the form of the theory of Natural and Rational Law. Secondly, the theory must be considered in the context of the present discussion of theories and they must be analyzed in relation to the work of the most prominent contemporary political philospher, John Rawls.

1. Systematic Requirements for a Theory of Justice

The systematic objections to a theory of Justice come, above all, from two opposite directions, from philosophical Anarchism, or the utopia of the freedom from domination, even from government on one side and a strong Legal Positivism and "Legitimation through (democratic) procedure" on the other. There is, in addition, the reproach of an "ahistorical ought."

The justification of principles of Justice only makes sense if one assumes that there is a need for the practical reality to which the principles refer. The practical reality of political Justice consists of Law and State. Political Justice is based on the idea that there should be legal and political relations between human beings. However, this assumption is denied by philosophical Anarchism and by the utopia of freedom from domination, even from government. For, according to them, each legal and political order, even an entirely just one, brings with it violations of the freedom of individuals and social groups. Legal and political relations therefore imply control and domination and, as such, are illegitimate. The goal is no longer a just government but, rather: freedom from government.

According to the basic intention of Legal Positivism, on the other hand, only the guaranteed Positive Law which has been authorized by the political Sovereign has the status of valid law. Whereas, according to philosophical Anarchism, the life-worldly hypothesis of Political Justice, the legal and political order are illegitimate, according to a strict Legal Positivism, the task of justification is already fulfilled with the legitimation of positive legal and political conditions; normative critical criteria of evaluation and even principles of justice become superfluous.

One can label the antithesis of Anarchism and strict Legal Positivism the Antinomy of the Justification of Law and State: the thesis of Freedom from government is opposed to the Antithesis of an arbitrary government.

An appropriate theory of Justice recognizes the legitimate merit of both positions but also rejects their excessive claims and opens up a legal and political theory beyond the alternative: Anarchism or Legal Positivism. With Legal Positivism it recognizes the necessity of a positive legal and political order and with Anarchism it denies the legitimacy of an arbitrary legal and political order. Both aspects taken together lead to the first basic proposition: to political Justice belong not only the legitimation but also the limitation of political domination. The theory of justice appropriates this proposition by showing, firstly, why a legal and political order is needed at all and, secondly, according to which principles it may be considered valid and just.

Legal Positivism is not an inherently homogeneous tendency which only stands in opposition to Natural and Rational Law and which simply denies the validity of supra-positive legal principles. Various kinds belong to Legal Positivism, which are linked to insights which an appropriate theory of Justice must also take into account.

Analytical Legal Positivism requires that a conceptual distinction be made, for good reasons, between Law and Morality. A theory of Political Justice follows on from this requirement in that it (second basic proposition), differentiates between personal and political justice and understands their object, Political Justice, as a normative idea of Law and State but not as a personal attitude or as moral virtue of individuals. In Political Justice a moral claim is certainly made on the political world. But this claim is directed at the external coexistence of people, not at the personal attitudes of each citizen. Political Justice is the final principle of the normative justification of a community. On the other hand, personal justice is that moral attitude which does not go beyond what one owes to the other person. Personal justice leaves the claims of Political Justice habitual and voluntary, not merely occasional and pursued out of a fear of punishment. Since the theory of Political Justice does not presuppose an idea of Justice as the basic disposition of a person, or justice as (personal) virtue, it acknowledges that a moment of coercion

belongs to every legal and political order, but certainly not of arbitrary coercion.

Thirdly, methodological Legal Positivism demands the avoidance of the is-ought fallacy. Since this demand is legitimate, the following theory of normative obligations of Political Justice does not follow on from the natural attributes of things and of man, at least not from them alone. An appropriate theory of Political Justice also includes a genuinely normative or, more precisely, an originally moral element. And according to Moore's theory of the Naturalistic Fallacy, this element is not finally defined in naturalistic concepts or in a descriptive metaphysics of them.

An appropriate theory of Justice must fulfil a fourth condition. In addition to the Naturalistic Fallacy it must avoid the Normative Fallacy, to which Hegel's reproach, directed against Kant, of an ahistorical ought ("ungeschichtliches Sollen") can be said to correspond. The normative fallacy consists in the attempt to derive specific or concrete obligations from normative consideration alone. In fact, normative considerations produce nothing more than the most general criteria of judgement. To achieve obligations and to be able to orientate action, normative criteria must be combined with descriptive basic elements furthermore with the functional claims of politics, society and economics and finally with contemporary concrete situations. The following theory of Justice avoids, the normative fallacy by not regarding the formation of the highest principle of Justice as anything more than one step in the context of a theory of Justice. All together it distinguishes four stages. In the first stage, it must be established why there is any need for Law and State at all; in the second stage, a highest principle of Political Justice must be defined; in the third stage this principle is specified in terms of secondary principles of justice, especially of human rights, according to the criteria of basic conditions of the socio-political world. In a fourth stage the problem is sketched of formulating such principles which I call the "Strategies of Political Justice".

2. A counter-model to Rawls' theory of Justice

No contribution to the theory of Justice has, in recent years, caused such an intense international debate as Rawls' Theory of Justice (cf.: Daniels and Höffe 1977). Rawls looks for a counter-model to Utilitarianism, which holds a dominant position in the English-speaking world, and according to which the highest goal of all action, including legal and political action, lies in the greatest well-being (happiness) of all concerned. In this way Justice becomes a function of social welfare; the level of satisfaction enjoyed by the whole of society and not of the individual takes precedence over personal freedom. A society of slavery or a police state which are so cleverly organized that although of course they seriously interfere with the range of personal freedom, they nevertheless guarantee a maximum collective and social utility, would not only be permitted but even made morally obligatory. But then Rawls is rightly convinced that the idea of Justice requires inviolable rights for every individual person, which one is not allowed to set aside even for the well-being of the whole of society (Rawls, § 1).

Although Rawls rejects Utilitarianism, his theory of Justice reveals itself, on closer inspection, to be a "half-hearted" alternative to the utilitarian concept of political Justice. For firstly his list of primary social goods contains heterogeneous elements. Whilst the rights and liberties can be defined independently of the human demand for happiness, and thus make possible a counter-model to Utilitarianism, income and wealth, and perhaps even opportunities and powers are general means towards the fulfilment of the most diverse needs and interests. However, a universal fulfilment of needs and interests signifies happiness and here Rawls reverts back to Utilitarianism.

Furthermore, Rawls attempts to prove the superiority of his idea of Justice as Fairness over Utilitarianism, with the help of decision Theory. Yet, a critical examination reveals that the decision Theory assessment of one of Rawls' principles of Justice leads precisely to the maximum average utility and so

to Utilitarianism and not to Rawls' Maximin rule; Rawls' own assessment legitimates the opposition. For beneath Rawls' veil of ignorance the decision in the original position, is not a decision under uncertainty but under risk. Its criterion of rationality is therefore: "Maximize the expected utility". Now, the expected utility is equivalent to the average utility so that the criterion of rationality reads: "Maximize the average utility", which corresponds exactly to Utilitarianism (see Höffe 1984). Only in the first, but not in the second principle of justice, especially not in the Principle of Difference does Rawls succeed in formulating an alternative to Utilitarianism.

Thirdly, even the rights and liberties in Rawls' theory are not free of a Utilitarian touch. Thus, they are considered as the general conditions for the pursuit of desired plans of life, and so they are, albeit indirectly, connected to human happiness and are not defined independently of it. Finally, it is an argument against Rawls that he makes no clear and reliable distinction between Law (political Justice) and Ethics (personal Morality).

Since Rawls rightly looks for a counter-model to Utilitarianism, but only succeeds in formulating a "half-hearted" counter-model, in what follows, a theory of Justice will be sketched which represents a clear critical alternative to Utilitarianism. The opposite model does not see Political Justice in terms of needs, interests and their fulfilment, happiness. It defines the legal and political idea exclusively in terms of freedom. The basic idea of Political Justice lies neither with Utilitarianism, in maximum happiness, nor with Rawls, in Fairness.It consists of equal freedom or, more precisely, on an equal limitation and protection of the freedom of action. The first part of the following outline of a theory of Justice sees the basic problem of Law and State in the compatibility of freedom, the second part, the Justice of Law and State in equal freedom; in the third part this is specified to human rights and is finally made concrete in "Strategies of Political Justice".

II. The constructive outline of a theory of Political Justice

1. The circumstances of Political Justice or Why is there a need for Law and State?

There are basically two models for the justification of Law and State: the Cooperation Model, which was developed paradigmatically from Aristotle, and the Conflict Model, which can be traced back to Hobbes. But it is not until Kant that the justification of Law and State is given that methodical elucidation, according to which Law and State are needed beyond the alternative "Cooperation or Conflict", as they are needed in order that human freedom may be made compatible and the compatibility of freedom may be guaranteed.

According to the famous definition physei politikon zoon (Politics, I 2) man is, for Aristotle, a living being who, on the grounds of biologically and psychologically based social impulses, is oriented towards an association with his fellow men, and who can only lead a successful and happy life (eu zen), a humane existence, in the shared life of the structure and quality of the town-state, of the Polis. In the teleological sense, that man only finds his self-fulfilment in the institutionalized association of free and equal beings, of the Polis, man aims to lead his life in the Polis (see Höffe 1979, Ch. 1).

Aristotle's thesis of the political nature of man is today undergoing a many-voiced rehabilitation. As research in anthropological, ethnological, psychological and other social sciences (with their extensive and differentiated material) confirms, man tends in various ways to seek an association with his fellow human beings. The key words here are: sexuality, the helplessness of children and the formation of the personality (formation of the identity of the self), through diverse social relationships. They are called the faculty of knowledge and the ability to use language, the necessity of work and its facilitation through the division of labour. Man is dependent upon his fellow man even for the survival of the individual and of the species and also for a pleasant, independent and just life.

Association is achieved in a multitude of social relationships (Primary institutions), such as marriage and the family, such as working relations, economic and protective associations. The state is the institution of second order, in which the professions, duties and functions of primary institutions develop into the fullness of methodical know how. Above all, the state is that secondary institution in which the different primary institutions and professions are established through a differentiated system of political institutions (such as magistracies, national assemblies and courts of justice), which can thus evolve into a structured system of co-existence and cooperation, and which make possible for man a successful and happy, a good and just life. In short, according to the Aristotelean type of argumentation, the state is necessary because man is a social being, who realizes his social nature in different primary relationships, which for their part, require a coordination as well as an adjustment of the idea of the Good and the Just.

According to the Aristotel model, the social nature of man is a sufficient basis for the foundation of Law and State. The politico-religious civil wars of Early Modern times, however, show, with terrible clearness, that there are also tendencies in man which are hostile to society and the State. Moreover, it does not take a civil war to see that although man certainly does have strong social impulses, one cannot trust them. For man also has aggressive and destructive tendencies which conflict with his social nature. Whether it happens because of envy, jealousy, vengefulness or pure malice, whether it is striving for power, recognition or possessions, whether it is out of an interest to impose one's own political or religious conviction - there are sufficient reasons and motives for the fact, that human beings turn against their fellow human beings. This state of affairs is especially true of modern man, who as he advances, dissociates himself from the bonds of a moral-political cohesive order, which had formerly supported him. Accordingly, modern political philosophy does not start from man's cooperative nature but from his conflicting nature. For his fellow human beings, man is not merely a help and a complement, but

also a competitor and a threat. Since the State as an institution, that is: as the lasting form of human association, should be real not only during the preponderance of the social, but also during the preponderance of the aggressive impulses, a thorough line of argumentation must take into account the "worst eventuality" and found the State precisely on this eventuality. That Hobbes, above all, clearly recognized this state of affairs and, unperturbed by political and philosophical hostilities, constructed his theory of the State upon this insight, is a confirmation of his greatness.

On the other side, such a line of argumentation still cannot convince philosophical Anarchism. For it could wish to explain conflicts arising from certain aggressive and destructive tendencies which for their part are due to specific economic and social marginal conditions, such as the institutions of private ownership and through a transformation of such historical conditions it could foretell the "decay" of legal and political relations. The justification of Law and State must therefore be stated one step more radically. It must be asked what Law and State ultimately consist of and whether they are necessary for the association of human beings. It is to Kant we owe this more radical step.

Three elements are indispensable for the concept of law. Firstly, Law applies to freely-acting and responsible human beings. In contrast to Laws of Nature legal regulations are not complied with independently of the subjects concerned. Legal regulations comprise a moment of request, of duty. Consequently, they only make sense to beings who understand such requests and can act in accordance with them, or against them. Legal regulations pre-suppose human beings who are free to act in one way or another and whose real doings can be attributed to them.

The responsibility or freedon of action alone creates no legal problems; lonely Robinson Crusoe does not yet know any law. Secondly, Law presupposes that there is more than one freely-acting human being. Law has to do with the co-existence of freedoms of action.

Since Law is concerned, on its fundamental plane, with the association of responsible subjects, needs and interests, which do not appear in action, when considered from the basic legal point of view, are at first, irrelevant. Law is not merely necessary because beings have needs and live together; for animals also have needs and yet they do not live in legal associations. Law is an indispensable institution only where the co-existence of free beings is at stake. In contrast to Utilitarianism, but also to Rawls' Principle of Difference, the legal association is, primarily, not an association of the needy, but a free association of responsible persons.

For the association of free individuals Law formulates orders, prohibitions and rules of procedure. An unrestricted freedom, the freedom to do and to leave whatever anyone considers to be just and good, is thereby limited. Law is, in its third element, a limitation of unrestricted freedom. The question of the necessity of Law and State therefore becomes the question: "Why does an association of free individuals make the limitation of the freedom of all of its members necessary?"

This question may be answered by the contrary, in a thought-experiment: "What would happen if there were no limitation of freedom and hence no Law and State?" In the philosophical tradition this thought-experiment is called the State of Nature and finds a distinct form in particular representatives. Locke, for instance, posits specific natural rights to inviolable claims concerning life and physical integrity concerning freedom and property of the proceeds of one's own work. With such claims Locke rightly acknowledges unrenounceable human rights. Nevertheless these human rights are methodically falsely placed; they are not pre-given constituents of the State of Nature, but are to be justified solely by the thought-experiment of the State of Nature and of the Social Contract. Hobbes, on the other hand, defines man by the basic endeavour to his own preservation, by an infinite inclination for happiness and the restless desire for power after power. Besides he presupposes an equality of strength in the ability to kill and that of the weakness in being killed.

With these elements, Hobbes succeeds in questioning Locke's problem, but he has still not recognized the nucleus of the theory of the State of Nature clearly enough. Kant is really the first to do this. According to him the State of Nature consists in the purely rational construction of an association of free human beings in the complete absence of legal and political relationships, anarchy in the literal sense of absence of coercion. In the State of Nature the unlimited, but wild freedom of all obtains; everybody can do whatever, to him, seems right and proper.

Now, the objection to such a state of affairs is not that it perhaps brings with it fear and alarm: that is, in fact, precisely what happens in the case of natural disasters too. The argument against the State of Nature is, rather, that it is a state of "externally lawless freedom" (Kant 1797, § 42). Nobody is obliged to refrain from encroaching upon the rights of others, just as he is not at all safe from the encroachments of others. In the State of Nature lawlessness leads to an inner contradiction. The hypothesis of an unlimited freedom of action, the "right to anything", reveals itself, on closer analysis, to be a right to nothing.

One has to agree with the representatives of social utopias of a free communication without constrain, on the point that human freedom is restricted by Law. However, one must oppose the view that such a restriction is superfluous, or even hostile to freedom. In fact, a co-existence of unrestricted freedom of action is not merely not worth wishing for, but even, in the strictest sense, inconceivable. And this fact is due, not to any supplementary argument, over which, for instance, liberalistic and Marxist philosophers are always in disagreement. Quite on the contrary, such controversies are reduced to mere waste paper. The impossibility is based neither on the assumption that man is, by his very nature, selfish, unsociable, obsessed by power or violent, nor on the assumption of a scarcity of the goods that man needs for the satisfaction of his needs and interests. The restriction of human freedom that occurs in Law is not legitimized by any empirical circumstances, whether of man or of

external nature. Prior to those empirical circumstances, the restriction of freedom is based on freedom itself, that is, on the capacity to set and to pursue aims at one's own discretion, connected with a number of such freely-acting individuals. For without a simultaneous limitation and protection of freedom, without a state of Law and its public guarantee, the freedom of everyone is always in danger of being destroyed.

The decisive argument against philosophical Anarchism and in favour of Law and State is found in the thought-experiment of the State of Nature. This first part of a theory of political Justice, if it is looked at methodically, still includes no empirical considerations but instead it already includes a normative element. For even if no co-existence of freedom of action is conceivable without Law, the statement: "Law should be" is not based solely upon the fact that it is inconceivable. Rather, as an additional premise, it is assumed that a co-existence of freedom of action should exist. This normative premise, however, has not yet been proved here. Its justification follows in the next part.

2. The Principle of Political Justice

After the question why there is a need for Law at all, one must deal with another one: according to the criteria of which principles can the Law be considered just? Since by Justice, we mean the highest, the moral criterion, we need, on the one hand, a criterion for the moral point of view which, on the other, is to be used in the legal problem of the mutual limitation of freedom.

In modern and contemporary philosophy, the criterion for the moral point of view is highly controversial. In Thomas Hobbes we find self-interest or personal well-being as a criterion, in Utilitariansim, the general well-being, in Kant, the categorical imperative, in the contemporary ethics of discourse, unrestricted discourse and in Rawls, the criterion of morality is put in the veil of ignorance.

To solve the controversy of the right criterion for the point of view in an unbiased and methodical way, we must first clarify the concept of morality and then, on the basis of this, seek to solve the controversy of the last criterion. The question of the principle of morality therefore begins with what I admit is only an intimated conceptual analysis.

Since, by the moral point of view we mean the highest claim that we can make of human practice it means something which is simply good or which is good without restriction, something that is not only good to or for something else, which, rather, is good in and for itself; which is necessarily binding (hence: the categorical imperative). A practice is unrestricted or necessarily binding only when it does not depend on the more or less arbitrary intentions of a person or of a type of person, but which, rather, is universally valid. When formulated in positive terms this means that the rigorous universalization of practice amounts to the moral point of view. To that extent, the competition which I hinted at earlier, in philosophical ethics, is decided in favour of Kant. With the concept of the categorical imperative Kant has rightly specified the character of the moral point of view, it denotes an unrestrictedly valid obligation.

Beyond this, with the criterion of universalization he found the last criterion of the moral point of view. The highest criterion lies not in the individual or in collective well-being; it lies in the rigorous universalization of the underlying principles. Instead of a strict universalization one can also speak of a universal capacity for consent and one can reconstruct this in the context of decision Theory as a "Veil of Ignorance". To this extent the criteria of Kant, of the Ethics of Discourse and of Rawls can be regarded as equivalent.

From the combination of the principle of universalization with the legal task of forming the basic structure of an association of free beings, emerges the highest criterion for Law, the principle of Political Justice. Whilst, in the first part of the theory of Justice, the Utopia of freedom from government is criticised, a strict Legal Positivism is rejected, in the second part, namely the idea that the Legislator (Lawgiver) may raise what is arbitrary to the rank of valid law. Thus, into the place, occupied by the freedom from domination, come not abitrary government, and the antinomy of the justification of Law and State "Freedom from domination or arbitrary government" is dissolved and raised in the idea of a just government. Only the combination of fundamental legitimation and the equally fundamental limitation of domination which is contained in the concept of a just government corresponds to the task of the theory of political Justice

Now a legal order suffices for the moral claim of rigorous universalization only when it, firstly, lifts the mutual threat of human freedom of action and, secondly, when it lifts it in such a way that the freedom of action is guaranteed not only for the powerful, whereby power can be not only of a physical but also of a psychological, economic or intellectual kind. A rigorously universal removal of the mutual threat to freedom takes place where the unrestricted freedom of action of an individual is restricted to such an extent as is necessary

to make possible the freedom of action of every other person. The removal of the mutual threat of freedom applies where the restriction of the freedom of action follows universal principles, which are strictly equal for all persons. Political Justice is therefore the embodiment of these conditions under which the freedom of action of one individual can be reconciled with the freedom of action of every other person in accordance with strictly universal laws.

In more concise terms, I call the principle of the mutual restriction and protection of the freedom of action in accordance with universal laws, the Principle of Equal Freedom. Its basic thought is derived from Kant's Theory of Law, especially the introductory paragraphs A-C (cf. Höffe 1983, ch.10).

With the help of the principle of equal freedom (objective) legal conditions are judged in terms of morality (legally practical reason) and not of positive validity or of public welfare. It is the legal and political order which makes possible an association of free beings based on strictly universal laws that is, in a fundamental sense, just.

The principle of equal freedom establishes a highest subjective claim, namely the claim of every freely-acting responsible person to live with every other one under legal conditions which satisfy the principle of Political Justice.

From the principle of justice also follows the authorization of Law to use coercion. In the authorization to use coercion there is thus no irrational force, no morally illegitimate presumption of Positive Legal order, but rather, an indispensable element of every law that wants to be just. As paradoxical as it might at first appear: without the authorization to use coercion, a law, which is committed to equal freedom is inconceivable. Thus, once again, all social utopias that dispense with every form of government and hence also with the coercive character of law, must be rejected and, indeed, this must be done with the argument to which the Utopias themselves refer, with the argument of freedom. For, according to the principle of equal freedom

every action is just which is compatible with the freedom of the others according to universal laws. Because such an action is just one also has the authorization to carry it out and every action which interferes with the authorization of another person is unjust. Since anyone who hinders someone else in his legitimate action is acting unjustly, coercion, which prevents illegitimate hindrance is a condition of the possibility of a legitimate free community and is therefore itself legitimate.

Nevertheless, with this fundamental justification of the authorization to use coercion not every type and every degree of coercion is morally sanctioned. Coercion is right and proper only in so far as it serves the repulsion of injustice. Every degree of coercion which exceeds this is itself an injustice.

3. Human Rights as the secondary principles of Political Justice.

The principle of equal freedom requires that every legal order be organized according to universally valid principles. In such principles the last criterion of Political Justice is specified according to the different fundamental aspects of the socio-political world. Such specific criteria or secondary principles are the universal conditions of the association of responsible human beings; they are the conditions of the mutual, external recognition of persons. Since it is a case of universal conditions of human coexistence, they are due themselves to man, when regarded from the point of view of political justice prior to and independently of any positive legislation. They are therefore also called human rights: innate, natural, inalienable and inviolable rights of every human being as a human being.

Human rights are claims which every individual has in respect of his fellow human beings and against political authorities. Since it is a case of claims which are due to every human being, as such, they belong to that which the legal order owes to man. Human rights are not at all based on voluntary action and on those actions based on socio-political love which go beyond what is owed. Quite on the contrary, they represent a vital element of a just legal and political order.

Since human rights are secondary principles of political justice, no legal order is allowed to renounce their recognition. If the laws and the institutions of a political association guarantee inner as well as outer protection, even if they guarantee coordination, efficiency and stability, and also guarantee economic well-being but at the same time are in conflict with human rights, they must, according to the criteria of human rights, be changed.

I include three groups of rights in the term human rights: the personal rights of freedom, the rights of political participation and social and cultural rights. This tri-partite division is directed against the frequent attempts to reduce the secondary principles of political justice to one of these groups. Such a reduction is contrary to the principle of equal freedom and is therefore illegitimate.

Whoever denies the personal rights to freedom takes away from man the claim to a rigorously personal range of action which must be kept free from every encroachment. Without the personal rights to freedom neither survival nor a pleasant and humane life are possible. The first right to freedom proves this most clearly, the right of the integrity of life and body. The legal circumstances cannot be concerned for man to remain alive for ever, never to become weak and finally die through illness, accident or old age. But they can and should be concerned that life and body be protected from the encroachments of fellow human beings and of the State. The corresponding human right of the integrity of life and body makes a double requirement of the State: on the one hand, in respect of one's fellow man, the prohibition of murder, violence, physical mutilation and abuse, and also of psychological oppression; the corresponding definitions of penal law thus have a significance in terms of human rights. The human right of the integrity of body and life also requires, in respect of the State itself, the protection from arbitrary arrest and punishment, thus constitutionally the oldest explicit human right (habeas corpus); in addition it also requires the prohibition of inhuman punishment and of torture.

As no community can function without a constitution, without laws and a government, the principle of equal freedom prohibits political discrimination in the form of a politically inferior lower class and also political privileges in the form of a politically superior upper class. Considered in positive terms, the principle of equal freedom requires the free and equal participation of all citizens in the formulation of the constitution, of the formation of the laws and of the government. Since this equal consitutional freedom is the characteristic of democracy as a political system, one can emphatically say: democracy ranks as a human right. Considered from the point of view of foreign policy, equal political rights of participation require the right of self-determination of all peoples, so that this right, too, has the dignity of a human right.

Furthermore, a political community which takes the rights of freedom and participation seriously, must be concerned about generally valid empirical conditions, without which one cannot realize the rights of freedom and those of participation at all or only to a very slight extent. It is therefore part of the role of political justice to take over responsibility for these framing conditions of an economic, social, cultural and political nature, which make the realization of the rights of freedom and those of participation impossible, which hinder them or excessively impede them. In contrast to critics of the idea of social human rights and of the idea of a Social Welfare State, like Nozick, a political community also carries a common responsibility for the basic conditions under which professional relations are specified and under which income, education and social status are acquired, used and transfered; it carries a responsability for the basic conditions pertaining to problems of employment, of old age, sickness and accident.

Of course, social rights may not be pursued at the expense of the rights of freedom and those of participation. For they are legitimate, from the point of view of human rights, as the condition of their realization, but not as the limitation of these rights. Social rights therefore justify a claim to care less than they justify a claim to the making possible and the protection of personal and political freedom; they legitimate

less the welfare state than a social state based on the principles of freedom and participation.

4. Strategies of Political Justice

Also in their specification to human rights and in their real recognition as fundamental rights and basic political aims, human rights order a concrete course of action only to a small degree. Above all, social rights are general normative criteria, to which Law and State are pledged although they do not yet define or even precisely indicate a concrete legal and political order or an individual political action. Thus human rights are principles of political justice in the sense of fundamental norms. There are norms of a second order, according to whose criteria the corresponding socio-political relations should be observed and judged and really organised or further developed. Thus, political justice is only realized where one forms the legal-political structures, the administration of justice and also the cultural reality and the economic and working world fully according to the criteria of human rights.

The real formation of political relationships according to the criteria of human rights is only possible given the assumption of a knowledge of the conditions of life and a consideration of the corresponding legality of actions. Therefore, the task presents itself of reconciling human rights with the functional claims of politics, society and economy and with contemporary concrete situations, which can be very diverse in different countries and at different times. Concrete justice must be open to such differences; human rights as universally valid principles of Political Justice require no undifferentiating and equal formation of legal-political relations in the whole world. Only through the historically concrete and consequently also historically different provision and recognition of human rights is their realization accomplished.

The processes of public decision-making, which deal with these fundamental ethico-pragmatic tasks of contemporary politics may be labelled "Strategies of Political Justice". What matters is for them methodically to justify principles of Political

Justice according to the functional requirements of a highly complex industrial society and its contemporary socio-historical situation (see Höffe 1975 and Höffe 1979, Ch. 15). Only with the insight into this task is the theory of Political Justice completed.

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Bibliography

Daniels, N., Reading Rawls. Critical Studies on Rawls' "A Theory of Justice", New York, 1975

Höffe, O., Strategien der Humanität. Zur Ethik öffentlicher Entscheidungsprozesse, Freiburg-München, 1975 (span.Buenos Aires 1979)

Höffe, O.,Hrsg., Über John Rawls' Theorie der Gerechtigkeit, Frankfurt/M., 1977

Höffe, O., Immanuel Kant, München, 1983

Höffe, O., Critical Introduction to Rawls' Theory of Justice, in: Contemporary German Philosophy, 2, 1985, 235-256.

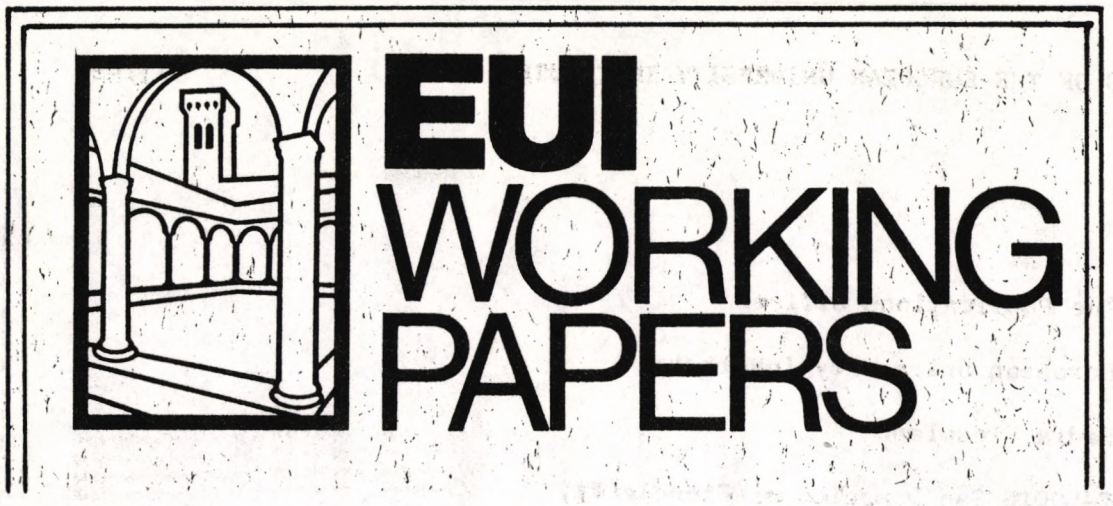
Höffe, O., How Kantian is Rawls' Theory of Justice? in Ratio 1984.

Kant, I., Die Metaphysik der Sitten, 1. Teil: Metaphysische Anfangsgründe der Rechtslehre, 1797, in: Preussische Akademie der Wissenschaften, Bd. VI, Berlin 1907

Moore, G.E., Principa Ethica, Cambridge 1903

Nozick,R., Anarchy, State and Utopia, New York 1974

Rawls,J., A Theory of Justice, Cambridge/Mass., 1971



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